

No. 08-769

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE*
NATIONAL SHOOTING SPORTS FOUNDATION, INC.
IN SUPPORT OF RESPONDENT

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Dave Coustan, *How Shotguns Work*, [http://
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INTEREST OF THE *AMICUS CURIAE*¹

The *amicus curiae* is the National Shooting Sports Foundation, Inc. (“the NSSF”), the trade association for the firearms, ammunition, hunting, and shooting sports industry. Formed in 1961, the NSSF is a Connecticut non-profit tax-exempt corporation with a membership of approximately 5,000 federally licensed firearms manufacturers, distributors, and retailers; companies manufacturing, distributing and selling shooting and hunting-related goods and services; sportsmen’s organizations; public and private shooting ranges; gun clubs; publishers; and individuals. The NSSF’s mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and the shooting sports; reaffirming and strengthening its members’ commitment to the safe and responsible sale and use of their products; educating its members and the public about wildlife conservation and ethical hunting; and promoting a political environment that is supportive of America’s traditional hunting and shooting heritage and Second Amendment freedoms. In keeping with its commitment to wildlife conservation and ethical hunting, the NSSF publishes pamphlets such as “The Ethical Hunter,” “What They Say About Hunting” and “The Hunter and Conservation,” which advocate

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

respect for wildlife, hunting laws, and the role of hunting as an important means of wildlife conservation. The NSSF supports and works closely with the Association of Fish and Wildlife Agencies (“AFWA”), the non-profit association of State fish and game agencies, as well as the United States Fish and Wildlife Service.

The NSSF’s interest in this action derives from the interest of its members to engage in interstate commerce in educational videos/DVDs, books, photographs, art and other images that depict traditional hunting, but that would nevertheless fit the description of “animal cruelty” codified in 18 U.S.C. § 48. The materials at issue often assist both novice and experienced hunters in learning the basics of hunting, as well as new and advanced techniques, wildlife conservation, and safe and ethical hunting. The NSSF’s retailer members provide the lawful commerce in those materials, which are many hunters’ primary source of information about hunting, including hunting safety and responsible techniques. More generally, as a guardian of our nation’s rich hunting and shooting heritage and traditions, the NSSF believes that lawful commerce in hunting-related products must be protected. Accordingly, the NSSF submits this brief in support of Respondent and urges this Court to affirm the decision of the court of appeals.

SUMMARY OF THE ARGUMENT

Until the recent federal prosecution in Pennsylvania of Virginia resident Robert Stevens, it appeared that 18 U.S.C. § 48 (“Section 48”) would be used in the limited manner for which it was enacted: to prosecute persons responsible for the creation, sale or possession of “crush videos,” which depict the torture and killing of animals to appeal to the prurient interest. With the instant prosecution, however, the understanding of the scope of Section 48 has changed dramatically. Small and large retailers across the country now face the prospect of criminal prosecution on a strict liability basis for the mere possession and lawful sale of traditional hunting images that – unbeknownst to those retailers – may technically violate Section 48.

Specifically, sporting goods retailers around the nation routinely carry for sale books and videos/DVDs that teach hunting techniques and photographs and artwork that otherwise depict hunting scenes. It is entirely possible that these books, videos, DVDs and photographs could contain an image of conduct that, while legal where the image was captured, is nevertheless illegal in the State where the retailer stocks and sells the video, book or photograph – or *vice versa*. If Section 48 is upheld, retailers can protect themselves from potential prosecution only by a) viewing in their entirety all of the materials they carry that may contain hunting images and b) assessing whether those materials contain images that: (i) fall within the ambit of Section 48(a); (ii) meet the subjective criteria of the exception codified at Section 48(b); (iii) violate the laws of the jurisdiction in which they were created; (iv) violate the laws in the jurisdiction where the retailers are located; or (v) violate the laws of the jurisdiction where the video is

sold or delivered. Indeed, simply possessing those materials for the purpose of this review could be deemed a violation of the statute. Even were a retailer to undertake this time consuming and difficult review of each item, the materials may not provide sufficient information to determine whether possession or sale would be lawful. For instance, a photograph in a book is unlikely to indicate where the photograph was taken.

In light of the burdensome and insurmountable obstacles imposed by the plain language of Section 48, the only safe choice for a retailer would be to refrain from selling hunting books, videos, DVDs and photographs, regardless of their legality. The chilling effect on lawful commerce in protected speech is manifest.

ARGUMENT

Section 48 is unconstitutionally overbroad, because it criminalizes free speech protected by the First Amendment. Section 48 was enacted to combat animal cruelty.² The NSSF abhors animal cruelty and the unethical taking of game. The broad language of the statute, however, criminalizes lawful speech and, in the process, chills lawful commerce in that speech.

2. Humans, of course, are a carnivorous species and throughout history have hunted as part of their food supply. Depictions of hunting appear on cave drawings from the beginning of mankind. At the same time, hunting has certain salutary benefits for wildlife, such as controlling against overpopulation, which can lead to deaths from starvation and related disease. The NSSF actively promotes safe and ethical hunting without unnecessary suffering to animals.

Hunting in the United States injects over \$66 billion into the national economy through hunting-related expenditures, taxes and licensing fees, and the creation of approximately 593,000 jobs.³ Approximately 14.3 million people in the United States engage in hunting.⁴ There are more than 54,000 federally licensed firearms retailers nationwide,⁵ many of which service the hunting industry by selling hunting-related products. The vast majority of these retailers are small businesses.

Many (if not most) of these retailers sell videos, DVDs and books that depict hunting scenes. Other hunting images appear in photographs sold for artistic purposes. For many hunters, videos/DVDs and print materials are a primary source of information about basic hunting instruction, advanced and novel techniques, hunting sites, and rules and regulations governing hunting. Indeed, a single large retailer with large catalog and substantial internet sales has estimated to the NSSF that its annual revenue from sales of hunting-related videos/DVDs is approximately \$25 million.

If Section 48 is upheld, this robust commerce in hunting videos, DVDs, books and pictures – and the concomitant free speech rights – will be chilled.

3. ASSOCIATION OF FISH AND WILDLIFE AGENCIES, HUNTING IN AMERICA: AN ECONOMIC ENGINE AND CONSERVATION POWERHOUSE 5, 8 (2007).

4. *Id.* at 5.

5. The NSSF obtained this figure in July 2009 from a database maintained by the Bureau of Alcohol, Tobacco, Firearms & Explosives (“ATF”), which the ATF has made available to the NSSF in response to a Freedom of Information Act request.

Section 48 reads as follows:

(a) Creation, Sale, or Possession.—

Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Exception.—

Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) Definitions.— In this section—

(1) the term “depiction of animal cruelty” means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

(2) the term “State” means each of the several States, the District of Columbia,

the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.

Although the statute was not intended to criminalize possession and sale of hunting-related images, it clearly reaches that far, as hunting necessarily involves the wounding and killing of animals proscribed by the statute. Moreover, the statute criminalizes possession and sale of images depicting hunting that may be legal in the State where a retailer resides, but illegal in the jurisdiction where the image was created – wherever that may be – or *vice versa*. As the court below found,

§ 48 is overinclusive. Although the statute would fail to reach depictions made solely for personal use, Party Y may, however, be prosecuted for selling a depiction in Pennsylvania made in Virginia even if the underlying activity is legal in Virginia but illegal in Pennsylvania. Party Z may be prosecuted for possessing a depiction in Virginia made in the Northern Mariana Islands even if the underlying activity is legal in the Northern Mariana Islands so long as Party Z intends to sell the depiction. *See* H.R. REP. NO. 106-397 [(1999)], at 11-12 (dissenting view). If the government interest is to prevent acts of animal cruelty, the statute's criminalization of depictions that were legal in the geographic region where they were produced makes § 48 overinclusive.

United States v. Stevens, 533 F.3d 218, 233-34 (3d Cir. 2008).

Compounding the problem of discerning which hunting laws might be implicated in a single image is the fact that hunting laws vary not only from State to State, but also from municipality to municipality. Those laws, which are often a patchwork of State and local laws, regulate minute details of hunting and can differ depending on the tract of land, type of animal, type of ammunition, type of weapon, or disability of the hunter involved. To understand the difficulty retailers would have in complying with Section 48, one need only consider the laws in a few States (much less those in all 50 States) that govern the whitetail deer – the most widely hunted species in the United States.

California, Connecticut, Illinois and Iowa (among other States) allow hunting of whitetail deer during specified seasons, albeit with certain restrictions. California allows hunting of whitetail deer using high-powered rifles, unless the land has been designated a “condor range,” in which lead ammunition is banned.⁶ Illinois and Iowa, meanwhile, permit whitetail deer to be hunted with shotguns, but prohibit hunting whitetail deer with high-powered rifles.⁷ Connecticut also permits

6. Cal. Fish and Game Code § 353(h) (prohibiting use or possession of “projectiles containing more than one percent lead by weight while taking or attempting to take any big game” within a California condor range).

7. 520 Ill. Comp. Stat. 5/2.25

It shall be unlawful for any person to take deer except (i) with a shotgun, handgun, or muzzleloading rifle or (ii) as provided by administrative rule, with a bow and arrow, or crossbow device for handicapped

(Cont’d)

the hunting of whitetail deer, but the type of firearm that can be used depends upon the size of the tract of land. If the tract of land hunted on is less than ten acres, the hunter must use a shotgun; if the tract is greater than ten acres, the hunter may use a high-powered rifle.⁸

(Cont'd)

persons, as defined in Section 2.33, and persons age 62 or older during the open season of not more than 14 days which will be set annually by the Director between the dates of November 1st and December 31st, both inclusive, or a special 2-day, youth-only season between the dates of September 1 and October 31. For the purposes of this Section, legal handguns include any centerfire handguns of .30 caliber or larger with a minimum barrel length of 4 inches.

Iowa Admin. Code r. 571-106.7(6)

Prohibited weapons and devices. The use of dogs, domestic animals, bait, rifles other than muzzleloaded or as provided in 106.7(5), handguns except as provided in 106.7(3), crossbows except as provided in 106.7(1), automobiles, aircraft, or any mechanical conveyance or device, including electronic calls, is prohibited, except that paraplegics and single or double amputees of the legs may hunt from any stationary motor-driven land conveyance.

Rifles have a grooved barrel, which allows a bullet to spin in flight and maintain its trajectory better and travel farther than a projectile shot from a shotgun, which does not have a grooved barrel. Dave Coustan, *How Shotguns Work*, <http://science.howstuffworks.com/shotgun8.htm>.

8. Conn. Gen. Stat. § 26-86a(a) (“The owner of ten acres or more of private land may allow the use of a rifle to hunt deer on such land during the shotgun season.”).

In light of this variability in State laws, a sporting goods retailer that stocks educational hunting videos/ DVDs could very easily possess images of a whitetail deer hunt that, unbeknownst to him or her, was illegal where the image was captured. For example, if a California retailer stocked a video that contained images of a whitetail deer hunted with a high-powered rifle, the retailer would violate Section 48 if:

- the hunter in the image did not have a valid license or permit, if required;
- the hunter was hunting out of season, either in California or in the State of purchase or creation;
- the hunter was hunting in a California “condor range” and used traditional ammunition containing lead components;⁹
- the hunting took place on a tract of private land that was less than ten acres, and the retailer sold the video to a customer in Connecticut;¹⁰
- the retailer sold the video to a customer in Illinois or Iowa, which do not permit the use of high-powered rifles;¹¹ or

9. Cal. Fish and Game Code § 353(h).

10. Conn. Gen. Stat. § 26-86a(a).

11. 520 Ill. Comp. Stat. 5/2.25; Iowa Admin. Code R. 571-106.7(6).

- the retailer sold the video to a customer in the District of Columbia, where all hunting is banned.¹²

As the foregoing illustrates, the retailer selling a video containing images of a whitetail deer hunt runs the risk of violating Section 48 unless the retailer can determine **where** the whitetail deer was hunted, **how** it was hunted, and **whether** the specifics of the hunt complied with the local law where and when the image was captured. When one then considers that whitetail deer is only one of many species that are regulated by the hunting laws of the 50 States, one realizes that there are countless permutations for how an image might be illegal where the image was captured, possessed, or sold. In short, as a practical matter, the plain language of Section 48 makes it impossible for a retailer to ensure that it is in compliance.

As a result, a retailer has two potential shields from prosecution under Section 48. The first is prosecutorial discretion in the States where the retailer possesses and sells the video. Given the prevalence and geographic reach of online commerce, a retailer could be facing the threat of prosecution in many States – even if it is selling a video that shows hunting that may have been perfectly legal in the State where the hunting took place. Moreover, whether the “depiction . . . has serious religious, political, scientific, educational, journalistic, historical, or artistic value” is a subjective determination

12. D.C. Code § 19-1560.1 (“All wildlife in the District is protected, and none shall be killed or otherwise taken except in accordance with this chapter.”).

that leaves the retailer in doubt about whether the exception would apply in a particular instance. The court below recognized the danger in this situation:

If a person hunts or fishes out of season, films the activity, and sells it to an out-of-state party, it appears that the statute has been violated. Similarly, the same person could be prosecuted for selling a film which contains a depiction of a bullfight in Spain if bullfighting is illegal in the state in which this person sells the film. The only possible protections for this violator are prosecutorial discretion and the exceptions clause in section (b). If this depiction has “religious, political, scientific, educational, journalistic, historical, or artistic value” but the value is not “serious,” then this violator only has prosecutorial discretion to fall back on. The penalty for these hypothetical violations includes a fine and up to five years in prison. 18 U.S.C. § 48(a). We do not believe that the constitutionality of § 48 should depend on prosecutorial discretion for a statute that sweeps this widely.

Stevens, 533 F.3d at 235 (citation omitted).

The second shield from prosecution – and the only one that ensures protection – would be for the retailer to cease altogether the possession and sale of hunting videos, DVDs, books and other images. Regardless of whether the drafters of Section 48 intended to chill such lawful commerce, the broad language of the statute has that chilling effect.

In short, leaving Section 48 intact essentially makes every retailer potentially guilty of a federal crime for doing nothing more than stocking a video or book that contains hunting images, and provides an overwhelming disincentive for retailers to continue their lawful commerce in hunting images. Because the broad scope of Section 48 creates an impermissible chilling effect on lawful commerce and speech in violation of the First Amendment's protections, Section 48 should be stricken.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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